When Cleansing Criminal History Clashes With the First Amendment and Online Journalism: Are Expungement Statutes Irrelevant in the Digital Age?

By Clay Calvert[†] & Jerry Bruno[‡]

I. INTRODUCTION

Pensky & Kim, a Florida-based law firm, proudly boasts on its website that "expunging a criminal arrest record is an easy way to put your past where it belongs . . . in your past."[1] Similarly, in 2010, a company called American Pardon Services trumpeted that "people who have been expunged have paid their debt to society and can go on living their lives like their criminal past had never occurred."[2] But is that really the case in the era of the Internet?

This question is important because the Internet makes it easy to rapidly access vast amounts of information. That information sometimes includes unflattering or negative personal data—an arrest record or criminal charge, for example—that some people would just as well assume *not* be so readily available and instead be kept private. Unfortunately, as criminal defense lawyer Robert Perez summed up on NPR, "[t]here's no such thing as privacy of criminal records anymore."[3] Even if a record is expunged, Perez explained, prospective

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1 *Seal or Expunge Criminal Records*, PENSKY & KIM.COM, http://www.penskykim.com/lawyer-attorney-1362316.html (last visited Jan. 1, 2011).

2 *Expungements*, AMERICANPARDONS.COM, http://www.americanpardons.com/expungements (last visited Jan. 1, 2011).

3 Martin Kaste, *Digital Data Make for a Really Permanent Record*, NPR.ORG (Oct. 29, 2009), *available at*

employers and landlords will find out about the criminal record if they use private database services that are unaffected by a court's expungement order.[4]

An expungement[5] order is "the erasure of a person's criminal record."[6] The term often connotes the complete destruction of a physical record and deletion of an electronic record.[7] Indeed, as Willamette University College of Law Professor James Nafziger recently wrote, the purpose of expungement statutes:

> has been to facilitate a convicted person's reentry into society. Specifically, statutes have had one or more of the following purposes: to eliminate discrimination against convicts who have fulfilled their sentence terms and have been deemed rehabilitated, to reduce the potential for continuing public sanction, and to reward rehabilitated convicts. Within its plain meaning, expungement might be expected to help accomplish these ends by sealing or physically destroying an offender's record and thereby shielding it from public scrutiny.[8]

The freedom of the press safeguarded by the First Amendment to the United States Constitution[9] stands in stark contrast, if not diametric opposition, to the underlying policies of personal privacy and the reintegration of convicted persons who have since paid their debt to society. Rather than burying or suppressing the truth about the past, the First Amendment's venerable vitality rests in the constant desire to expose the truth and to test competing conceptions of it.[10] Margaret Love, former chair of the American Bar Association's Criminal Justice Standards Committee Task Force on Collateral Sanctions, wrote in a 2003 law journal article that the policies underlying expungement of records "requires a certain willingness to 'rewrite history' that is hard to square with a legal system founded on the search for truth."[11]

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http://www.npr.org/templates/story/story.php?storyId=114276194&sc=emaf.

4 *Id.*

5 The authors use this term interchangeably with "expunction" during the remainder of the article.

6 Andrew Hacker, Comment, *The Use of Expunged Records to Impeach Credibility in Arizona*, 42 ARIZ. ST. L.J. 467, 468 (2010).

7 Kristin K. Henson, Comment, *Can You Make This Go Away?: Alabama's Inconsistent Approach to Expunging Criminal Records*, 35 CUMB. L. REV. 385, 393 (2005).

8 James A. R. Nafziger & Michael Yimesgen, *The Effect of Expungement on Removability of Non-Citizens*, 36 U. MICH. J.L. REFORM 915, 917 (2003).

9 The First Amendment to the United States Constitution provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I. The Free Speech and Free Press Clauses were incorporated eighty-five years ago through the Fourteenth Amendment Due Process Clause to apply to state and local government entities and officials. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925).

10 *See infra* notes 12-15 (discussing the truth-seeking rationale that underlies the marketplace of ideas theory that dominates First Amendment jurisprudence). *See e.g.,* Cent. Hudson Gas & Elec. Co. v. Public Serv. Comm'n. of New York, 447 U.S. 557, 598 (1980) (Rehnquist, J., dissenting) (characterizing the first amendment as vital to the "free flow of information" and supporting it as a test of competing conceptions by describing it as "essential to our system of self-government").

11 Margaret Colgate Love, *Starting Over With a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code*, 30 FORDHAM URB. L.J. 1705, 1726 (2003).

The marketplace of ideas theory of free expression[12] is one of most commonly used figurative descriptions of our idea of free speech in the U.S.[13] In the ideal view of the time-honored marketplace theory, competition among ideas either produces the truth, or at least, the best conception of the truth at any one time.[14] As Professor Frederick Schauer observes, the premise of the marketplace theory is that "truth will most likely surface when all opinions may freely be expressed, when there is an open and unregulated market for the trade in ideas," resting "in part on the value of an adversarial process as a means of discovering truth."[15]

The marketplace of ideas theory serves what the nation's high court calls the "truth-seeking function"[16] of speech, which sometimes is referred to as "the search for truth rationale."[17] The high court explained more than four decades ago that "[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself

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[12] For an excellent overview of the history and goals of the theory of the marketplace of ideas, *see* Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CAL. L. REV. 2355 (2000).

[13] MATTHEW D. BUNKER, CRITIQUING FREE SPEECH: FIRST AMENDMENT THEORY AND THE CHALLENGE OF INTERDISCIPLINARITY 2 (2001) (noting that the marketplace of ideas "represents one of the most powerful images of free speech, both for legal thinkers and for laypersons"); *see also* LUCAS A. POWE, JR., THE FOURTH ESTATE AND THE CONSTITUTION 237 (1991) (describing the theory of the marketplace of ideas as "the dominant First Amendment metaphor").

[14] The marketplace of ideas metaphor is closely associated with former Supreme Court Justice Oliver Wendell Holmes, Jr. *See* Miriam A. Cherry & Robert L. Rogers, *Prediction Markets and the First Amendment*, 2008 U. ILL. L. REV. 833, 837 (2008) (writing that "Oliver Wendell Holmes's analogy of free speech as 'a marketplace of ideas' is compelling because it describes an environment in which speakers and listeners in search of truth can place value upon and choose between competing thoughts"). Holmes famously explained more than 90 years ago:

> But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.

Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).
See Steven G. Gey, *Papers from the First Amendment Discussion Group: The First Amendment and the Dissemination of Socially Worthless Untruths*, 36 FLA. ST. U. L. REV. 1, 6-7 (2008) (observing that "the use of an open marketplace of ideas to discover truth (and indeed the phrase 'marketplace of ideas' itself) is a concept commonly associated with Oliver Wendell Holmes's famous First Amendment opinions in the early part of the twentieth century").

[15] FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL INQUIRY 16 (1982).

[16] Hustler Magazine. v. Falwell, 485 U.S. 46, 52 (1988).

[17] William P. Marshall, *In Defense of the Search for Truth as a First Amendment Justification*, 30 GA. L. REV. 1, 2 (1995).

or a private licensee."[18]

Moreover, the freedom of the press provided by the First Amendment to journalists allows the news media to freely and truthfully report on all varieties of criminal matters as watchdogs on government,[19] including affairs related to—and punishments meted out by—the criminal justice system. Watchdog journalism[20] serves as a check on the executive, legislative and judicial branches of government.[21] This furthers the search for the truth by bringing government behavior to light for public discussion and debate.

This article attempts to bridge the realm of criminal law with both the province of First Amendment theory and the territory of news media ethics. In particular, it addresses the troubling tension between criminal expungement statutes and the Constitutional freedoms of speech and press. Presently, this strain is exacerbated in an online world in which news stories regarding the arrest and charging of an individual—*regardless* of the ultimate outcome of a case, be it dismissal, plea bargain, acquittal or conviction—for an alleged crime can lugubriously languish and linger in perpetuity in cyberspace and be easily discovered through a few key strokes on a Google or Yahoo search engine, simply by entering an individual's name.[22] Ken Paulson, former editor of *USA Today*, recently wrote about the anxiety that Internet users have when confronted by the possibility that their personal information could be shared with the world.[23]

This conflict parallels, if not neatly mirrors, the fractious friction between privacy (privacy in the sense of informational privacy[24]) and the unenumerated

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[18] Red Lion Broad. Co., Inc., v. FCC, 395 U.S. 367, 390 (1969).

[19] First Amendment scholar and current Furman University President Rodney A. Smolla wrote in 2008 that "[w]e live at a time in American history in which the watchdog role of a free and aggressive press is more vital than ever." Rodney A. Smolla, *The First Amendment, Journalists, and Sources: A Curious Study in Reverse Federalism*, 29 CARDOZO L. REV. 1423, 1430 (2008).

[20] *See* Rachel Luberda, *The Fourth Branch of Government: Evaluating the Media's Role in Overseeing the Independent Judiciary,* 22 NOTRE DAME J. L. ETHICS & PUB. POL'Y 507, 516-517 (2008) (defining watchdog journalism as a means of holding government accountable to the public through media scrutiny). *See also* Emily Berman, *Democratizing the Media*, 35 FLA. ST. U. L. REV. 817, 825 (2008) (noting that the watchdog role of the press increases the "transparency of government actions" and encourages accountability). *See generally* TIMOTHY W. GLEASON, THE WATCHDOG CONCEPT (1990) (providing background on the watchdog concept in American journalism).

[21] W. Lance Bennett & William Serrin, *The Watchdog Role*, *in* THE PRESS 169, (Geneva Overholser & Kathleen Hall Jamieson eds., 2005).

[22] *See infra* Part III and accompanying notes.

[23] Ken Paulson, *Privacy vs. Public Right to Know*, USA TODAY, Mar. 18, 2010, at 11A (explaining that "new technology and the Web have spurred understandable anxiety from people concerned about having the details of their lives shared with strangers").

[24] Professors Daniel J. Solove and Paul M. Schwartz write that "information privacy concerns the collection, use and disclosure of personal information. Information privacy is

First Amendment public right to know,[25] along with statutorily defined laws creating rights of access to government documents under states' open-records laws.[26] Indeed, if journalists are to invoke what philosopher Sissela Bok aptly and accurately dubs "the language of rights"[27] in expungement situations—the claim is that they are serving the public's *right* to know by disclosing information about one's criminal past, even when that past has been wiped away, for purposes of person's civil rights, by a judge's order—then they take on additional obligations. In particular, journalists need to carefully craft explanations for the public, rather than rationalizations, to defeat the privacy and rehabilitation concerns that underlie expungement statutes in this dialectical dance.[28]

Part II of this article provides a brief overview of both the history and public policy behind expungement statutes in the United States. Part III then describes how technological forces and developments today, when coupled with the First Amendment protection of free expression, are thwarting and confounding the goals of expungement laws. Next, Part IV uses two very recent, real-life examples from 2010 to illustrate this problem, including one which directly involves the co-author of this article. Finally, Part V concludes that because the First Amendment makes it impossible for courts to mandate that news organizations purge their websites of stories conveying information that has been expunged from court records, the issue moves from the realm of news media law to news media ethics. In particular, Part V argues that journalists have an ethical responsibility in the digital age to follow-through and follow-up when reporting on criminal activity—an obligation to do more than just report on the arrest of an individual for driving under the influence, for instance, but also to report again on that same individual should his or her arrest record stemming from that incident be expunged or the charges stemming from it be dismissed. In brief, *if a story reporting on the arrest of a person is to remain, in virtual perpetuity, on a newspaper's website and/or a newspaper database like Lex-*

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often contrasted with 'decisional privacy,' which concerns the freedom to make decisions about one's body and family." DANIEL J. SOLOVE & PAUL M. SCHWARTZ, PRIVACY AND THE MEDIA 1 (2008).

[25] The ethics code of the Society of Professional Journalists, for instance, provides that "[j]ournalists should be free of obligation to any interest other than *the public's right to know.*" *Code of Ethics,* SOCIETY OF PROFESSIONAL JOURNALISTS, http://www.spj.org/ethicscode.asp (last visited Jan. 1, 2011) (emphasis added).

[26] *See generally Open Government Guide*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, http://www.rcfp.org/ogg/index.php (last visited Jan. 1, 2011) (providing "a complete compendium of information on every state's open records and open meetings laws. Each state's section is arranged according to a standard outline, making it easy to compare laws in various states").

[27] SISSELA BOK, SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION 256 (Vintage Books ed., 1989).

[28] *Id.*

isNexis Academic, then so too should a story reporting on the ultimate conclusion, resolution or outcome of that same matter, including the expunction of that arrest and the legal meaning of that determination as it affects the person's rights and re-entry into society.

II. ERASING ONE'S PAST LEGAL TRANSGRESSIONS: AN OVERVIEW OF THE HISTORY AND POLICY OF EXPUNGEMENT STATUTES

This part of the article provides a brief primer and background on expungement in the United States. It is not intended to be a comprehensive review of expungement law, but rather is designed merely to establish the conflict that is described in Part I between the purposes and public policies that underlie expungement, on the one hand, and the First Amendment freedoms of speech and press, on the other.

A. Defining Expungement

As a threshold matter, the initial question for most communication scholars and media law attorneys who may dabble on only rare occasions in the world of criminal law is foundational: What is expungement? A treatise on the matter encapsulates it:

> Expungement generally means the expurgation, extraction and isolation of all records on file within any court, detention or correctional facility, law enforcement or criminal justice agency concerning a person's detection, apprehension, arrest, detention, trial or disposition of an offense within the criminal justice system by removal, deletion, erasing, sealing, destroying and other processes.[29]

Expungement typically is a creature of statutory law, with legislative bodies across the United States defining the concept in different ways.[30] As the Supreme Court of Alabama wrote in 2006, "whether citizens should be entitled to have their criminal arrest records expunged is a substantive matter involving policy considerations within the purview of the legislature, not this Court."[31]

It is left for courts to engage in the process of statutory construction in order

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[29] EXPUNGEMENTS 3RD – FREEDOM FROM THE DISABILITY OF A LEGAL RECORD 19 (J.D. Eastman ed., 2005).

[30] For instance, Pennsylvania provides that expungement means "to remove information so that there is no trace or indication that such information existed" and "to eliminate all identifiers which may be used to trace the identity of an individual." 18 PA. CON. STAT. § 9102 (2010). Rhode Island defines expungement in terms of "the sealing and retention of all records of a conviction and/or probation and the removal from active files of all records and information relating to conviction and/or probation." R.I. GEN. LAWS § 12-1.3-1(2) (2010).

[31] Mobile Press Register, Inc. v. Lackey, 938 So. 2d 398, 403 (Ala. 2006).

to interpret the meaning of expungement statutes.[32] For instance, a New Jersey statute defines expungement as "the *extraction* and *isolation* of all records on file within any court, detention or correctional facility, law enforcement or criminal justice agency concerning a person's detection, apprehension, arrest, detention, trial or disposition of an offense within the criminal justice system."[33] In interpreting the emphasized portion of this language, the Supreme Court of New Jersey has held that the "statute requires merely the '*extraction* and *isolation*,' not the *destruction*, of expunged records."[34] This is more than just a matter of verbal gymnastics; it is an important difference because a record that is not destroyed might someday be released or disclosed under certain circumstances.[35] Put more simply, a record that is destroyed no longer exists; a record that is sealed remains on file somewhere, be it electronically or in paper form.

Expungement, however, does not fall exclusively within the realm of statutory law.[36] As the Supreme Court of Kansas observed nearly twenty years ago, "courts have inherent power over their official records,"[37] and this power can affect expungement statutes. The high court of Kansas, for instance, noted that "where a defendant, whose former criminal convictions have been expunged, is directly involved in civil litigation, a district court might in its discretion permit the release of certain documents contained in an expunged file in order to achieve the ends of justice."[38] Likewise, the Supreme Court of Minnesota observed in 2000 that "the exercise of a court's inherent power to expunge is a matter of equity."[39]

In summary, expungement law is primarily statutory law, with legislative bodies defining it in different ways across the country. Even in the absence of statutory authority, however, courts have the inherent power in equity to expunge records as they see fit in the interest of justice.

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[32] *See, e.g.*, Gosnell v. Arkansas, 681 S.W.2d 385, 387 (Ark. 1984) (interpreting the meaning of an Arkansas expungement statute, and applying "the basic rule of statutory interpretation" that "the legislature's affirmative statement of the effect of a statute is an implied denial of its having some other effect").

[33] N.J. STAT. ANN. § 2C:52-1 (2010) (emphasis added).

[34] State v. XYZ Corp., 575 A.2d 423, 426 (N.J. 1990) (emphasis added).

[35] *See infra* note 49 and accompanying text.

[36] *See infra* notes 37-39 (describing how some courts have held that they have the inherent discretion to grant expungement).

[37] Pope v. Ransdell, 833 P.2d 965, 978 (Kan. 1992).

[38] *Id.*

[39] State v. Ambaye, 616 N.W.2d 256, 261 (Minn. 2000).

B. The Policies Behind Expungement Statutes

While jurisdictions and courts take different approaches, the underlying reasons for expungement statutes are the same: "to promote the offender's progress toward rehabilitation [and] to encourage him . . . to assert his civil rights."[40] The magnitude of the negative consequences of having either a criminal conviction or a mere criminal arrest record in one's past can be deleterious, if not profoundly damning.[41] Jon Geffen, an attorney for the Expungement Project of the Southern Minnesota Regional Legal Services, Inc., writes that "the possibility of an expungement gives hope to those individuals who are forced to the margins of society because of a criminal record."[42] That is the case, he observes, because "a person with a criminal history is often prevented from integrating into society. A criminal record carries with it an assumption that a person who has had contact with the criminal justice system is untrustworthy or will have problems in the future."[43]

Fruqan Mouzon, Adjunct Professor at Seton Hall University School of Law and Director at Gibbons, P.C. in the Business Litigation and White Collar Criminal Defense groups, concurs with this sentiment, noting that:

> The mere existence of a criminal history can produce assumptions of past dishonesty and future untrustworthiness in the minds of all those aware of that history. Those assumptions often create substantial obstacles to acquiring, among other things, employment and housing. In addition, some ex-offenders are disqualified at least temporarily from obtaining federal loans or grants for post-secondary education. Even government programs designed to assist the poor, like food stamps, are unavailable to some ex-offenders, making rehabilitation far more arduous.[44]

Reintegration into society without employment or housing and without any chances of attaining help is, at best, unlikely.

Persons with arrest records can suffer the same marginalizing effects suffered by those with criminal records. The policies behind expunging arrest records are substantially the same as those behind expunging conviction records.[45] As an Ohio appellate court wrote in 2007, "in America, people are

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40 McClish v. Arkansas, 962 S.W.2d 332, 334 (Ark. 1998).

41 *See generally* Joseph Fried, *When Help Wanted Comes with a Catch; Re-Entry is Often Grueling for Ex-Cons, Despite Laws and Programs to Aid Them*, N.Y. TIMES, Sept. 17, 2006, Sec. 10, at 1 (describing how criminal records have prevented ex-cons from gaining employment); Jonathan Friendly, *How Long and to Whom Should Crime Records be Open?*, N.Y. Times, Jan. 8, 1984, Sec. 4, at 6; Jerome Milller, *Judging by the Record*, N.Y.Times, March 22, 2000, at A27. *See infra* notes 42-44 and accompanying text.

42 Jon Geffen & Stefanie Letze, *Chained to the Past: An Overview of Criminal Expungement Law in Minnesota–State v. Schultz*, 31 WM. MITCHELL L. REV. 1331, 1335 (2005).

43 *Id.*

44 Fruqan Mouzon, *Forgive Us Our Trespasses: The Need for Federal Expungement Legislation*, 39 U. MEM. L. REV. 1, 3-4 (2008).

45 *See* Andrew L. Gates III, Comment, *Arrest Records – Protecting the Innocent*, 48

presumed innocent unless tried and convicted. In this case, *the defendant was tried and found not guilty, but continues to suffer punishment in the form of a criminal arrest record. This we cannot allow.*"[46] Thus it is the policy in Ohio that "expungements in cases where there have been not-guilty findings should be freely granted."[47]

Indeed, the legislature in Delaware codified a very similar public policy that underlies its expungement statute targeting arrest records:

> The General Assembly finds that arrest records can be a hindrance to an innocent citizen's ability to obtain employment, obtain an education or to obtain credit. This subchapter is intended to protect innocent persons from unwarranted damage which may occur as the result of arrest and other criminal proceedings which are unfounded or unproven.[48]

In summary, expunctions can range from the expungement of an arrest record all the way through the expungement of a conviction. The policies that underlie these results are rehabilitation and re-entry into society.

C. Ramifications of Expunction

The impact and effect of an expunction order is not uniform in the United States. In a 2009 article published in the *Federal Sentencing Reporter*, Attorney Margaret Love observes that "[t]he effect of a judicial order of expungement varies from state to state."[49] For instance, Professor Mike E. Jorgensen of Florida Coastal School of Law notes that some states "treat expungements as procedures for sealing records only,"[50] while in others "the expunction of the felony means that the conviction must legally be treated as never having occurred."[51]

In Ohio, for example, expungement simply means the sealing of a record.[52]

TUL. L. REV. 629, 634 (1974) (observing that "a mere arrest record has considerable potential for causing harm to an individual," particularly when the person attempts to obtain a job).

46 Ohio v. Garry, 877 N.E.2d 755, 755 (Ohio Ct. App. 2007) (emphasis added).

47 *Id.*

48 11 DEL. CODE § 4371 (2010).

49 *See* Margaret Colgate Love, *Alternatives to Conviction: Deferred Adjudication as a Way of Avoiding Collateral Consequences*, 22 FED. SENT'G REP. 6, n.4 (2009) (citing MARGARET COLGATE LOVE, RELIEF FROM THE COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION: A STATE-BY-STATE RESOURCE GUIDE 43-49 (2006)).

50 Mike E. Jorgensen, *The Convicted Felon as a Guardian: Considering the Alternatives of Potential Guardians With Less-Than-Perfect Records*, 15 ELDER L.J. 51, 70 (2007).

51 *Id.*

52 *See* OHIO REV. CODE ANN. § 2953.32(A)(1) (LexisNexis 2006) (providing, in relevant part, that a "first offender may apply to the sentencing court if convicted in this state, or to a court of common pleas if convicted in another state or in a federal court, for the *sealing of the conviction record*") (emphasis added). Colorado, Nevada, Vermont and the District of Columbia also deal with expungement by sealing criminal records. *See* COLO. REV. STAT. §

In contrast, under Maryland law, once a person's record is expunged for a criminal charge that did not result in a conviction, he or she no longer has to provide any information about it or even refer to it if asked about it.[53] Moreover, Maryland law makes it clear that such refusal to disclose expunged charges "may not be the sole reason for: (i) an employer to discharge or refuse to hire the person; or (ii) a unit, official, or employee of the State or a political subdivision of the State to deny the person's application."[54]

Pointing out some of the legal limitations and the not-always-so-blank-slate shortcomings on expungement laws, Love, who worked as a Pardon Attorney in the United States Department of Justice from 1990 to 1997, writes that:

> A record that has been expunged is rarely destroyed, and is almost always available for law enforcement purposes. In many states, an expunged record may be used as a predicate offense, and some employers and licensing boards also have access to expunged records, even though many state laws specifically authorize an offender to deny having ever been convicted.[55]

For instance, Texas courts are permitted to consider an expunged conviction "as a factor in sentencing for subsequent criminal convictions."[56] An example helps to illustrate the point that the impact of an expunction order may be qualified, rather than absolute. In particular, current Tennessee law provides that:

> All public records of a person who has been charged with a misdemeanor or a felony shall, upon petition by that person to the court having jurisdiction in the previous action, be removed and destroyed without cost to the person, if: (i) The charge has been dismissed; (ii) A no true bill was returned by a grand jury; (iii) A verdict of not guilty was returned, whether by the judge following a bench trial or by a jury; or (iv) The person was arrested and released without being charged.[57]

24-72-308 (2009) (arrest and criminal records other than convictions may be sealed if the individual was not charged with a crime, or if the case against the individual was completely dismissed); NEV. REV. STAT. ANN. § 179.245 (LexisNexis 2006) (an individual convicted of a crime may petition the court for the sealing of all records relating to the conviction); VT. STAT. ANN. TIT. 33, § 5119 (2009) (records of juvenile delinquents will be sealed after two years have elapsed since the final adjudication unless the individual in question has been subsequently convicted of another crime, has a criminal case pending, or has not been rehabilitated to the satisfaction of the court); D.C. CODE § 16-803 (2010) (criminal records of individuals acquitted of an eligible misdemeanor or whose prosecution has been terminated without conviction may be sealed).

[53] *See* MD. CODE ANN., CRIM. PROC.§ 10-109 (LexisNexis 2008). The state statutes of Illinois, Oklahoma, and Virginia also provide that certain individuals with expunged criminal records are not required to provide information about their expunged charges to potential employers, educational institutions, or government agencies. *See* 705 ILL. COMP. STAT. 405/5-915 (West 2010); OKLA. STAT. ANN. TIT. 10A, § 2-6-109 (West 2009); VA. CODE ANN. § 19.2-392.4 (2008).

[54] MD. CODE ANN., CRIM. PROC.§ 10-109 (LexisNexis 2008).

[55] Love, *supra* note 49, at n.4.

[56] State v. Willis, 400 N.Y.S.2d 706, 707 (N.Y. County Ct. 1977) (examining Texas expungement law); *see* TEX. CODE CRIM. PROC. ANN. ART. 42.12 (West 2006)

[57] TENN. CODE. ANN. § 40-32-101 (2006).

The removal and destruction provisions, do not apply, for instance, to defendants who successfully complete diversion programs for sexual offenses.[58] In addition, Tennessee law provides that "a person shall not be entitled to the expunction of such person's records in a particular case if the person is convicted of any offense or charge, including a lesser included offense or charge."[59]

D. Types of Records that Can Be Expunged: Juveniles and Adults

In light of the long-term harms caused by a person's legal record,[60] it is not surprising, as attorney T. Markus Funk writes, that "[n]umerous statutes, both federal and state, allow for—and occasionally even mandate—the expungement of juvenile convictions when the juvenile reaches a certain age."[61] In fact, Funk notes that, in certain situations, all fifty states allow for those with juvenile records to request to have them expunged or destroyed.[62] He adds that the public policy and theory behind these measures is that "expungement protects the juvenile's chances for rehabilitation and increases his likelihood of being reintegrated into mainstream society."[63]

In a different law journal article, Funk and Professor Daniel D. Polsby of Northwestern University School of Law explain that expungement laws began gaining nationwide support in the 1960s and 1970s[64] due largely "to the work of the 'labeling theorists."[65] These theorists argued that "perceptions of others control or influence one's behavior"[66] and thus destroying the police record of

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[58] Tennessee law provides that:

> Notwithstanding the provisions of subdivisions (a)(1)(B) and (C), the records of a person who successfully completes a pretrial diversion program pursuant to §§ 40-15-102—40-15-107, or a judicial diversion program pursuant to § 40-35-313, shall not be expunged pursuant to this section, if the offense for which the person was diverted was a sexual offense as defined by § 40-39-202, or a violent sexual offense as defined by § 40-39-202.

TENN. CODE. ANN. § 40-32-101(a)(1)(D) (2006).

[59] TENN. CODE. ANN. § 40-32-101(a)(1)(E) (2010).

[60] *See supra* notes 41-48 and accompanying text.

[61] T. Markus Funk, *A Mere Youthful Indiscretion? Reexamining the Policy of Expunging Juvenile Delinquency Records*, 29 U. MICH. J.L. REFORM 885, 887 (1996).

[62] *Id.* For a sample of present day juvenile expungement statutes in Arkansas, Rhode Island, and North Carolina, *see infra* notes 70-73 and accompanying text.

[63] T. Markus Funk, *A Mere Youthful Indiscretion? Reexamining the Policy of Expunging Juvenile Delinquency Records*, 29 U. MICH. J.L. REFORM 885, 888 (1996).

[64] T. Markus Funk & Daniel D. Polsby, *Distributional Consequences of Expunging Juvenile Delinquency Records: The Problem of Lemons*, 52 WASH. U. J. URB. & CONTEMP. L. 161, 169 (1997).

[65] *Id.* For more on labeling theory, *see, e.g.,* Aidan R. Gough, *The Expungement of Adjudication Records of Juvenile and Adult Offenders: A problem of Status,* 1966 WASH. U. L. Q. 147 (1964); Robert W. Sweet, Jr., *Deinstitutionalization of Status Offenders: In Perspective*, 18 PEPP. L. REV. 389 (1991).

[66] Funk & Polsby, *supra* note 64, at 169.

a minor who otherwise is labeled by society as a "deviant"[67] helps to remove one of the primary impediments to rehabilitating the juvenile.[68]

Even before the 1960s and the labeling-theory movement, expungement statutes were developing, particularly in the realm of juvenile matters. As Margaret Love writes:

> The concept of expungement or sealing of convictions had developed in the 1940s in connection with specialized state sentencing schemes for youthful offenders, whose susceptibility to antisocial conduct was thought to be temporary and who were therefore considered 'easier to rehabilitate than adults.' The idea was to minimize the legal consequences of conviction, and give youthful criminals 'an incentive to reform' by 'removing the infamy of [their] social standing.' In 1950, Congress extended the 'clean slate' concept to federal offenders between the ages of eighteen and twenty-six, making them eligible to have their convictions 'set aside' if the court released them early from probation.[69]

A statutory example illustrates the expungement of the criminal records of minors. Arkansas law today provides that:

> [a] person who is convicted of a nonviolent felony committed while the person was under the age of eighteen (18) years and who was incarcerated or whose sentence was suspended, or who was placed on probation, may petition the convicting court to have the record of the conviction expunged upon completion of the sentence or expiration of the suspension or probation period or at any time thereafter.[70]

This statute is instructive because it makes clear the qualified nature of many expungement provisions, namely that: (1) not all felonies committed by minors can be expunged (only nonviolent ones); and (2) expungement is not automatic (it must be petitioned for and, even then, can be denied if a court determines that it is not "in the best interest of the petitioner and the state").[71] Other states also have qualified expungement provisions, such as Rhode Island, which only allows first-time offenders to file a motion for expungement and, only then, when the underlying crime did not involve violence.[72] North Carolina allows expungement for first-time offenders who plead guilty to certain criminal actions before the age of 18 years and then who complete a deferred prosecution program, including supervised probation for a minimum of one year.[73]

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67 *Id.*

68 *Id.*

69 Love, *supra* note 49, at 1709; Federal Youth Corrections Act, ch. 1115, 64 Sta. 1085 (1095) (repealed 2010).

70 ARK. CODE ANN. § 16-90-602(a) (2009).

71 ARK. CODE ANN. § 16-90-602(b) (2009).

72 R.I. GEN. LAWS § 12-1.3-2 (2009). *See* R.I. GEN. LAWS § 12-1.3-1 (1) (2010) (defining "crimes of violence" for purpose of the Rhode Island expungement statute); R.I. GEN. LAWS § 12-1.3-1 (3) (2010) (defining "first offender" for purpose of the Rhode Island expungement statute).

73 N.C. GEN. STAT. § 14-50.29 (2009); *see also* HAW. REV. STAT. § 712-1256 (2009); ME. REV. STAT. 15 § 3308 (2009); N.Y. CRIM. PROC. LAW § 720.15 (McKinney 2010); OKLA. STAT. 22 § 18 (2010); VT. STAT. ANN. TIT. 3 § 163 (2009); WIS. STAT. § 973.015 (2009).

In summary, this Part of the article has provided an overview of expungement law as it exists today in the United States. It is a decidedly uneven terrain, lacking uniformity, but the overall goals seem clear—to provide those with criminal records an opportunity to return to a productive, normal life, free from the stigma that attaches from being labeled a criminal.

III. THE FIRST AMENDMENT AND THE INTERNET: TWIN FORCES PUSHING BACK AGAINST THE EFFECTIVENESS OF EXPUNCTION

"[E]xpunction under state law does not alter the historical fact of the conviction."[74]

The United States Supreme Court's seemingly simplistic, if not obvious, observation above provides the lynchpin for understanding the inherent conflict between expungement statutes and the First Amendment. In particular, journalists gather and report facts[75]—facts about arrests, charges, pleas and convictions. Expungement laws seek to erase those facts. The facts and corresponding events from which they arise simply do not disappear into the ether because a judge issues an expunction order.

Technology has amplified this conflict between the First Amendment and expunction laws. In the not-too-distant past, however, recovering facts about an arrest or a conviction from a prior edition of a newspaper required far more time and effort than today. For instance, a person would need to visit a newspaper's offices to peruse its so-called morgue of old issues or visit a local library to search for an article on well-worn, reel-to-reel microfiche machines, replete with their often scratchy images. As journalist Robert Niles recently explained in the *Online Journalism Review*:

> In the past, when old newspapers went into the local landfill and newspapers' archives were available only through a trip to the paper's headquarters (or maybe the local library), few people ever ran across these old arrest reports. If you wanted to run a criminal check on someone, say a job applicant or potential tenant, you called up the court and got the arrest and conviction records from there. If a record had been expunged, there'd be no report; the person would come through clean and there'd be no problem.[76]

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[74] Dickerson v. New Banner Inst., Inc., 460 U.S. 103, 115 (1983) (emphasis added).

[75] *See* Carlin Romano, *What? The Grisly Truth About Bare Facts*, *in* READING THE NEWS 38, 41 (Robert Karl Manhoff & Michael Schudson eds., 1986) (providing a critique of the concept of "facts" in journalism, and observing that "news" and "facts" are "the twin props of mainstream American journalism").

[76] Robert Niles, *Online News Archives Never Die, Nor Do They Fade Away*, ONLINE JOURNALISM REV. (July 13, 2010), http://www.ojr.org/ojr/people/robert/201007/1867.

Today, such time and effort is no longer required. Using the Internet, one can: (1) search a newspaper's own website—albeit, sometimes for a fee[77]—through archived editions to find stories about a particular individual or topic; (2) use common search engines like Google and Yahoo! that cast a vast, wide net across all Internet content; and (3) use online databases like LexisNexis Academic that feature content collected from hundreds of different newspapers at the local, national and international level.[78]

Professor Michael Froomkin wrote one decade ago that "[i]n light of the rapid growth of privacy-destroying technologies, it is increasingly unclear whether informational privacy can be protected at a bearable cost, or whether we are approaching an era of zero informational privacy."[79] Crime-related news stories reported on the Internet often remain posted indefinitely—even after criminal charges are dropped or cases come to a close.[80] This abundance and persistence of information further thwarts the goals of expungement.

Technology thus is a critical variable in a former prisoner's assimilation back into the outside world. Although the legislative intent behind expungement statutes is to facilitate a "person's reentry into society,"[81] technological development makes it difficult for records to be truly expunged—effectively

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77 For example, NYTimes.com, and Washingtonpost.com both allow access (in the case of Washingtonpost.com, greater access is available to paying customers) to online archives free of charge. *See e.g., Member Center Customer Service*, NYTIMES.COM, http://www.nytimes.com/ref/membercenter/help/welcome.html (last visited Jan. 1, 2011) (showing how "NYTimes.com members receive free access to features including . . . Expanded access to the Archive"); *Site Search*, WASHINGTONPOST.COM, http://www.washingtonpost.com/wp-srv/newssearch/ (last visited Jan. 1, 2011) (providing for "[E]nhanced [s]earch [c]apabilities" allowing users access to "[f]ree articles going back 60 days"); *Purchase Options*, WASHINGTONPOST.COM, http://pqasb.pqarchiver.com/washingtonpost/offers.html (last visited Jan. 1, 2011) (describing several payment options for variable degrees of access to Washington Post archived articles, including a "25 – Pack" package for $ 29.95).

78 *See LexisNexis Fast Facts*, LEXISNEXIS, http://academic.lexisnexis.com/media/fast-facts.aspx (last visited Jan. 1, 2011) (noting that the service provides access to "records from more than 45,000 legal, news and business sources"); *ProQuest About Us*, PROQUEST, http://www.proquest.com/en-us/aboutus/ (last visited Jan. 1, 2011) (explaining that ProQuest provides access to content "not likely to be digitized by others").

79 A. Michael Froomkin, *The Death of Privacy?*, 52 STAN. L. REV. 1461, 1465 (2000).

80 Today, some Web sites allow general members of the public to search for arrest records and criminal records for a fee. *See* CRIMESEARCHES, http://www.crimesearches.com (last visited Jan. 1, 2011). Additionally, as a 2009 article in the *Pacific Journalism Review* noted, "crime stories remain on the Internet indefinitely on sites such as *Crime Library* and are there for all to see, long after the cases have been officially closed, denying those involved the privacy they often desire." Joy Cameron-Dow, *The Question of Crime: How Much Does the Public Have a Right to Know?*, 15 PAC. JOURNALISM REV. 71, 73 (2009).

81 Nafziger & Yimesgen, *supra* note 8, at 917; *see* LEGAL ACTION CENTER, AFTER PRISON: ROADBLOCKS TO REENTRY (2004), *available at* http://www.lac.org/roadblockst-to-reentry.

nullifying these statutes.[82] As attorney Pierre H. Bergeron, Adjunct Professor of appellate practice at the University of Cincinnati College of Law, wrote in a 2005 law journal article:

> [C]omplicating the goals of expungement is the fact that we live in the Internet age. Criminal records - sometimes even traffic tickets—are accessible by anyone with a computer and an Internet connection in many jurisdictions. While judicial records may be sealed easily enough, the same cannot be said of clearing the conviction or offense from other sources. If an individual seeking employment responds that she has never been convicted, but the employer decides to "Google" her and finds a conviction, the individual sits in even a worse place—now she appears to be untruthful.[83]

Journalists are also aware of this issue. Paul Silva observed in a 2009 column that "getting out of Google's grip is harder than clearing the legal record" and that "in the age of Google, it is very difficult to clear one's name."[84] This recognition does not change the reality that journalists are in the business of gathering and reporting facts, not erasing them.[85] Silva further commented that, "newspapers . . . cannot be in the business of erasing the past. Corrections, yes. Obliterations, no."[86]

This idea is in accord with the ethical obligation of journalists to serve the public as truth-tellers[87]—telling the truth, in this case, about alleged criminal wrongdoings, rather than covering them up by deleting files, redacting archives or otherwise jettisoning the indicia and residue of old stories. The ethics code of the Society of Professional Journalists, for instance, requests that journalists "seek truth and report it."[88] Similarly, the ethics code of *The New York Times* dictates that "[w]hatever the medium, we tell our audiences the complete, unvarnished truth as best we can learn it."[89]

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82 Nafziger & Yimesgen, *supra* note 8, at 917.

83 Pierre H. Bergeron & Kimberly A. Eberwine, *One Step in the Right Direction: Ohio's Framework for Sealing Criminal Records*, 36 U. TOL. L. REV. 595, 597 (2005).

84 Paul Silva, *Signs of Life – No Escape From Google's Grip*, BEACH REP., Dec. 30, 2009, *available* on LexisNexis Academic.

85 *See* Romano, *supra* note 75 and accompanying text (noting that journalists gather and report facts).

86 Silva, *supra* note 84.

87 *See* Michael Skoler, Why the News Media Became Irrelevant – And How Social Media Can Help, 63 NIEMAN REP. 3, 38 (2009) (stating that "[j]ournalists are truth-tellers."). *See also SPJ – Code of Ethics*, SOCIETY OF PROFESSIONAL JOURNALISTS, http://www.spj.org/ethicscode.asp (last visited Jan. 1, 2011)

88 *SPJ – Code of Ethics*, SOCIETY OF PROFESSIONAL JOURNALISTS, http://www.spj.org/ethicscode.asp (last visited Jan. 1, 2011).

89 *The New York Times Company Policy on Ethics in Journalism*, N.Y. TIMES CO., http://www.nytco.com/press/ethics.html#A1 (last visited Jan. 1, 2011). *See also Mercury News Ethics Policy*, SAN JOSE MERCURY NEWS, http://www.mercurynews.com/ethics-policy (last visited Jan. 1, 2011); Orlando Sentinel Editorial Code of Ethics, ORLANDO SENTINEL, http://www.orlandosentinel.com/about/orl-ethicspolicy-080106,0,7234165.htmlstory (last visited Jan. 1, 2011); *Code of Ethics*, KAN. CITY STAR, http://www.kansascity.com/code_of_ethics (last visited Jan. 1, 2011).

The bottom line is that "[j]ournalists are in the business of revelation, not concealment."[90] They have ethical obligations to report the truth, not to cover up the past, and the First Amendment guarantee of a free press prevents them from being compelled to purge their records of truthful reporting on arrests and convictions, even if they are later the subject of an expunction order.[91] Moreover, actually purging the Internet of content is an extremely difficult, if not impossible feat, to achieve once it migrates beyond a newspaper's own website to a newspaper database like ProQuest Direct and LexisNexis Academic.[92]

IV. BEYOND ACADEMIC THEORY: CONTROVERSIES FROM 2010 INVOLVING EXPUNCTION AND FREE EXPRESSION

This part illustrates that the issues explored thus far are anything but a mere academic exercise. This section demonstrates how the combustible combination of expungement, free speech and the Internet can produce dilemmas and consequences in the legal system. Journalists, and those individuals caught up in the maelstrom, may suffer and have to endure long-term tolls for alleged bad deeds, far beyond the intended terms envisioned when expungement laws were adopted long before the era of the Internet.

A. The Wily Defense Attorney's Efforts to Tell the Press What to Do

Writing in the *Philadelphia Inquirer* in July 2010, journalist Emilie Lounsberry succinctly and accurately captured the gist of a real-world controversy that flared up in rural Pennsylvania and laid bare the tension between press

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[90] LOUIS ALVIN DAY, ETHICS IN MEDIA COMMUNICATIONS: CASES AND CONTROVERSIES 90 (5th ed. 2006).

[91] *See* Shifflet v. Thomson Newspapers Inc., 431 N.E.2d 1014, 1018-1019 (Ohio 1982). The Ohio Supreme Court asserted that the purpose of an expungement statute is:

> [N]ot to censor or render actionable the memories and statements of the general public as to observed past events or court records but to prevent public officials from *further* dissemination of these records...To reach out and attempt to render untrue that which a member of the general public, in this case a reporter, has in fact observed and heard in a court proceeding would be, in our opinion, clearly beyond the purposes of the statute. It would turn it from the limited shield it may be for the offender, into a sword for the confounding of the public which has a right, except perhaps in special circumstances...to attend criminal proceedings and a right to speak the truth.

Id.

[92] *See generally* Walt Crawford, *This Is Going On Your Permanent Record*, ECONTENT, July 1, 2005, at 42 (explaining that the Internet stores "snapshots" of content at various points in time which creates a sort of permanent archive of web content).

freedom and expunction statutes when she wrote:

> A First Amendment flap in central Pennsylvania was resolved Wednesday when a judge said two local newspapers were no longer under court order to delete archived news articles about 41 clients of a State College lawyer seeking to have their records expunged. The expungement orders will be revised to remove any reference to the *Centre Daily Times* and the *Daily Collegian*, the student paper at Pennsylvania State University, Centre County Judge Thomas Kistler said.[93]

The story, highlighting the free-speech friction with expunction, made the pages of the *Los Angeles Times*. The article noted that the criminal defense attorney embroiled in the controversy "was concerned the media's 1st Amendment rights to free speech were trumping his clients' rights to have cleared records."[94] Amendola wanted the two local newspapers, the McClatchy-owned *Centre Daily Times* and the independent *Daily Collegian*, to remove articles from their online archives because he knew that "employers often screen prospective hires, in part, by trolling Google and social-networking websites."[95]

Amendola queried to the news media in rhetorical fashion, asking "[w]hat's the sense in having your record expunged if anyone can Google you and it comes up?"[96] Indeed, that is the problem today facing both the criminal justice system and those caught up in its web. *Have expungement statutes lost their purpose and relevance in the digital age?* Amendola told the *Centre Daily Times* that this issue should "be looked at by the legislature, on a national level"[97] and that "there should be some sort of balancing test . . . . It's becoming a nightmare."[98]

Elizabeth Murphy, editor-in-chief of the Pennsylvania State University student newspaper *The Daily Collegian,* stood on the First Amendment side of the controversy. Murphy argued that "*The Daily Collegian* is a record of history as it happens." Ms. Murphy pointed out that the student newspaper is not an arm of the court or any other government entity. Rather, the purpose of the *Daily Collegian* is "to report the news that happens day in and day out" and that purpose alone is her "bottom line."[99] Bob Heisse, the Executive Editor of the *Centre Daily Times*, similarly pointed out that newspapers are not a part of

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93 Emilie Lounsberry, *Judge Rescinds Order for 2 Pennsylvania Newspapers to Delete Archives*, PHILA. INQUIRER, July 8, 2010, at B1.

94 *Papers Ordered to Delete Stories*, L.A. TIMES, July 7, 2010, at A9.

95 Editorial, *Erasing History*, PHILA. INQUIRER, July 10, 2010, at A8.

96 Emilie Lounsberry, *Newspapers told to delete archives*, PHILA. INQUIRER, July 7, 2010, at B1, B7.

97 Sara Ganim, *Lawyer: Secretary Put CDT on Order*, CENTRE DAILY TIMES (July 8, 2010, 8:18 PM EDT), http://www.centredaily.com/2010/07/08/2082056/lawyer-secretary-put-cdt-on-order.html.

98 *Id.*

99 Sommer Ingram, *Pa. Judges Order Newspapers to Delete Archived Online Content*, STUDENT PRESS LAW CENTER (July 6, 2010), http://www.splc.org/newsflash.asp?id=2115.

the adversarial process and their archives cannot be so simply expunged. He stated:

> This is a court order that basically wants the entire history of the crime, since they completed their time, to disappear from the world. And that's not the way you do things. Even if we did take this down from our website and *The Daily Collegian* took it down, it's still out there and going to be found. The clients are not going to accomplish their goal here.[100]

Heisse added that "facts are facts, and we don't go back and alter the historical record to suit someone. Yes, we're in the age of Google but it all comes down to personal responsibility in the first place. That has not changed."[101] Press freedom and the realities of a world archived on the Internet ultimately trumped the goals and ideals of expungement, as these orders were rescinded.[102]

B. The Case of Jerry Bruno

Another real world example of the failings of expungement law in today's digital world is the case of Jerry Bruno, co-author of this article.[103] For Bruno, there are multiple, specified conditions that must be fulfilled before he becomes eligible under Florida law to file a petition to have his arrest record[104] expunged[105] or sealed.[106] As set forth in his two-year deferred prosecution

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[100] *Id.*

[101] Sara Ganim, *Update: Judge Rescinds 3 Orders Directing CDT to Delete Stories; 2 Orders Remain*, CENTRE DAILY TIMES, July 6, 2010, at A1, A3, http://www.centredaily.com/2010/07/06/2077381/judges-tell-cdt-to-erase-stories.html.

[102] *See* Lounsberry, *supra* note 96, at B1 (noting that "a judge said two local newspapers were no longer under court order to delete archived news articles about 41 clients of a State College lawyer seeking to have their records expunged").

[103] Mr. Jerry D. Bruno, is currently an undergraduate student at the University of Florida. In 2009, he was arrested for an alleged sexual assault on campus.

[104] Under Florida law, a "record" is defined as "any and all documents, writings, computer memory, and microfilm, and any other form in which facts are memorialized, irrespective of whether such record is an official record, public record, or admissible record or is merely a copy thereof." FLA. STAT. Ann. § 943.045(7) (West 2010).

[105] Under Florida law, expungement of the record of a person's criminal history is defined as:

> [T]he court-ordered physical destruction or obliteration of a record or portion of a record by any criminal justice agency having custody thereof, or as prescribed by the court issuing the order, except that criminal history records in the custody of the department must be retained in all cases for purposes of evaluating subsequent requests by the subject of the record for sealing or expunction, or for purposes of recreating the record in the event an order to expunge is vacated by a court of competent jurisdiction.

FLA. STAT. § 943.045(13) (West 2010).

[106] Under Florida law, sealing of a criminal history record "means the preservation of a record under such circumstances that it is secure and inaccessible to any person not having a legal right of access to the record or the information contained and preserved therein." FLA.

agreement (DPA),[107] Bruno must abide by the following terms and conditions during this period, including but not limited to: (1) refraining from violating any federal or state law or county or municipal ordinance; (2) paying the $100.00 cost of prosecution pursuant to Florida Statute 938.27[108] to Office of the State Attorney; (3) performing fifty hours of community service; (4) reading the victim impact statement of the alleged victim; and (5) having no contact with the alleged victim directly, indirectly or through a third party through the entire twenty-four-month period, other than writing to him a sincere letter of apology.[109] If the co-author complies with these conditions of his DPA, which is an increasingly common procedure,[110] the charge(s) will be dismissed, which will make him eligible to file a petition for expungement.[111]

Once Bruno meets this lengthy list of requirements, legally his record will be expunged. However, outside the courtroom, the digital realm will likely maintain records of his original arrest without any mention of the subsequent expungement. This pervasive *digital reality* includes an archived article describing Bruno's arrest and his alleged criminal actions. Even if his record is expunged, the information chronicling Bruno's arrest and charges will still exist as part of the public domain, freely available on the website of the local newspaper, the *Gainesville Sun*.[112]

To put it bluntly, an offense allegedly committed by Bruno when he was a 19-year-old college student that may be dismissed in a court of law (if the conditions described above are met) could very well live on in near perpetuity, even after his record is expunged. While the *Gainesville Sun* could voluntarily

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STAT. ANN. § 943.045(14) (West 2010).

[107] Deferred Prosecution at 1-2, Florida v. Bruno, No. 01-2008-CF-004918-A (Fla. Cir. Ct. Oct. 1, 2009). A copy of this document has been reviewed by this journal, but is no longer in its files due to the possible pending expungement of the case.

[108] *See* FLA. STAT. § 938.27 (West Supp. 2010) (providing, in relevant part, that "in all criminal and violation-of-probation or community-control cases, convicted persons are liable for payment of the costs of prosecution, including investigative costs incurred by law enforcement agencies . . . if requested by such agencies.").

[109] Deferred Prosecution at 1-2, Florida v. Bruno, No. 01-2008-CF-004918-A (Fla. Cir. Ct. Oct. 1, 2009). A copy of this document has been reviewed by this journal, but is no longer in its files due to the possible pending expungement of the case.

[110] *See* Peter Spivack & Sujit Raman, *Regulating the 'New Regulators': Current Trends in Deferred Prosecution Agreements*, 45 AM. CRIM. L. REV. 159, 159 (2008) (writing that "deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs) are proliferating. In four years (2002-2005), prosecutors and major corporations entered into twice as many of these agreements (also called pretrial diversion agreements) as in the previous ten years combined").

[111] *See* FLA. STAT. § 943.0585 (West Supp. 2010) (providing the terms and procedures for court-ordered expunction of criminal history records); VFD v. State, 19 So.3d 1172, 1174-75 (Fla. Dist. Ct. App. 2009).

[112] Lise Fisher, *UF Student Charged with Sexual Assault*, GAINESVILLE SUN (Fl.), Nov. 4, 2008, at 2B, *available at* http://www.gainesville.com/article/20081104/NEWS/811040259.

take down the link to the article regarding Bruno, it certainly cannot be compelled or ordered by a court to do so, due to the First Amendment protection of freedom of the press.[113]

Why is Bruno committed in the pages of this journal to telling his story, warts and all? The answer goes beyond merely providing his own side of the story; providing a very real, and very human face on a problem that many people his age may experience. He may endure every challenge and hurdle every legal obstacle necessary to have his record expunged and yet, despite fulfilling every possible requirement prescribed by the law, his reputation and digital persona will still bear the stains of an inaccurate and out-of-date online record that could be used against him.

The dangers are numerous. A potential employer could find the article and deny Bruno employment. From a social standpoint, his friends and colleagues could stumble upon the article and lose their trust in him. The existence of this information in the public domain leaves Bruno subject to discrimination, embarrassment, and potentially even blackmail, as someone may threaten to leverage the information against him.

Bruno strives to share his story because he is a prime example of how challenging it is to fully move on in the digital age. Bruno's deferred prosecution will take place on September 30, 2011, and even after his charges are dismissed, he will nevertheless face more legal hurdles to get his record expunged. These hurdles include obtaining a certificate of eligibility from the Florida Department of Law Enforcement (FDLE) and turning it over to the local court. Bruno must then petition the court to order his arrest record sealed or expunged.

The legal process is not speedy, so it could take months before Bruno will be able to resolve the expungement issue. Once cleared, his privacy on this matter will still be subject to the whims of the Internet. Bruno hopes that sharing his story in this article will prompt some action to mitigate the consequences of this flaw in the current state of arrest record expunction.

Bruno does not tell his story in an attempt to abridge the freedoms of the press endowed by the First Amendment. Rather, he hopes to encourage an adoption of ethical principles which could help to avoid this problem altogether. Publishers could show some restraint in respect of an arrested party's privacy at the outset, or publish retractions to explain the implications of the arrested party's record expungement. This particular case can serve as a model, whereby the local newspaper could update its digitally archived version of the story to include a short line explaining that he was never convicted (if the case

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[113] *See supra* Part III (providing an example of where the First Amendment concerns trumped those of expungement).

ends up getting sealed or expunged). At the very least, such a statement could serve as a good starting point in finding solutions to the lingering reputational concerns associated with expungement in the digital era.

With Jerry Bruno's story in mind, the article now turns to consider whether the issue that he and others like him face is perhaps best left to the realm of media ethics rather than to media law.

V. RECOMMENDATIONS & CONCLUSION: A MATTER OF MEDIA ETHICS, NOT MEDIA LAW

This article thus far has demonstrated a trio of realities that create problems for both the legal system and for individuals with criminal records:

• *the Internet—the medium on to which journalism content, once traditionally reserved only for newsprint, now has migrated and where it remains, both easily accessible and in potential perpetuity—makes hiding or erasing one's criminal past, ranging from a simple arrest record to an actual conviction, exceedingly difficult;*

• *the rehabilitative policy underlying expungement laws is largely thwarted, if not rendered completely nugatory, by news articles that circulate in cyberspace long after a court record has been destroyed, isolated or otherwise sealed;*

• *the First Amendment guarantee of a free press, as exhibited by the 2010 controversy in State College, Pa.,*[114] *prohibits courts from mandating that newspapers expunge both their own hardcopy files and their online websites of stories about the alleged past wrongdoings of individuals who subsequently have had their criminal records expunged.*

In light of these three considerations, the critical question becomes: *Is it possible, in the absence of the force of law, to better balance the competing interests at stake in the digital age between expungement laws and the First Amendment guarantee of a free press?*

The answer to that query, this article argues, rests largely in the hands of journalists; either in their resistance or their voluntary willingness to embrace an ethical standard of fairness and thoroughness of reporting under which if a

[114] *Supra* Part IV.A.

newspaper publishes a story regarding the arrest of an individual, then it takes on an ethical obligation to subsequently report on the expunction of that same individual's record should such a resolution occur.

Such an ethical obligation makes sense, in part, because of the ability that online newspapers possess to distribute information quickly and easily to a vast audience around the world.[115] Journalist Paul Silva, for example, writes that "the Internet has reinforced the power and responsibility of journalism."[116] The problem is compounded, he contends, by the way journalists cover crimes: "[t]oo often crime reporting focuses more on the beginning of the story – suspicions, arrests and indictments—than on the resolution, whether it be a conviction, exoneration, dropping of charges or . . . expungement."[117]

Silva's point suggests a need for journalistic follow-through when reporting on criminal activity—for more comprehensive and complete coverage across the arc of a case, from its start to its finish, from arrest through possible expungement. It suggests that journalists carry an ethical obligation to report an expunction if they previously have reported on the arrests and/or criminal proceedings that came before it. In brief, this article proposes that:

> *If a newspaper reports on an arrest, criminal charge or conviction, then it also should report on its subsequent expunction.*

A corollary to this admonition is:

> *If a newspaper reports on the expunction of a person's criminal past, then it should explain to its readers the meaning and implications of expunction, including whether it allows the person to treat the matter as if it never happened and to lawfully deny its occurrence.*

Because the digital age renders it virtually impossible to bury one's criminal past after it has been reported on by a news organization, perhaps the best outcome the individual can hope for is to have that same news organization report on his or her expunction, in the name of accuracy and fairness, to bring the story up to date and to its final resolution.

Reporting on an expunction thus is somewhat analogous to the already-

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[115] *See* Clay Calvert, *The First Amendment, Journalism & Credibility: A Trio of Reforms for a Meaningful Free Press More than Three Decades After Tornillo*, 4 FIRST AMEND. L. REV. 32, 34-35 (2006) (discussing the "agenda-setting function" of the news media and its impact on the public's determination of important news); Richard T. Karcher, *Tort Law and Journalism Ethics*, 40 LOY. U. CHI. L.J. 781, 792 (2009) (asserting that the press carries a "huge ethical responsibility" because of its ability to influence public perception).

[116] Silva, *supra* note 84.

[117] *Id.*

embraced ethical norm of preparing a correction or clarification in journalism.[118] Indeed, as journalist Robert Niles observes, "a story about an old arrest is *not* accurate when it is published *to a new reader* if that story fails to note that the charges have been dismissed and expunged."[119]

If journalists are unwilling to purge their websites of news stories about individuals who have had their criminal past judicially expunged, then they certainly would seem to have an ethical obligation—in the name of fairness, truth telling and accuracy—to report on the expungement itself. Imagine that, in addition to the usual police blotter in the local newspaper listing arrests for everything from drug possession to driving under the influence of alcohol, a separate online "*expungement blotter*" exists in which journalists took the time and effort to acknowledge that the law has deemed some individuals deserving of re-entry into mainstream society with a clean slate. Such an expungement blotter may sound far-fetched at first, but there is little reason why it cannot occur if a newspaper decides to take that path. There is no newsprint shortage or space problem for such an online expungement blotter.

On the other hand, there certainly are financial costs for operating such an expungement blotter. In particular, a newspaper would need to hire a reporter to manage and maintain such a blotter. This reporter's salary obviously represents a financial cost for a newspaper. Alternatively, rather than hire a new employee, a newspaper might shift a reporter's beat, moving her off of one beat in order to take over the role of maintaining an expungement blotter. This shift of personnel resources might mean that news that once would have been covered by the reporter now is not because someone needed to cover the expungement blotter.

Other ethical norms suggest this may be an appropriate tack. The ethics code of the Society of Professional Journalists admonishes those in the news media to "be judicious about naming criminal suspects before the formal filing of charges."[120] This suggests an ethical concern about unfairly tainting someone with the stigma of association with criminal activity. Expungement, in turn, is about removing the stigma from an individual who already is tarred with it, perhaps merely because of an arrest that was never prosecuted.[121]

Viewed in this light, then, perhaps a new recommendation should be this:

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[118] *See, e.g. Code of Ethics*, SOCIETY OF PROFESSIONAL JOURNALISTS, http://www.spj.org/pdf/ethicscode.pdf (last visited Jan. 1, 2011) (stating that "journalists should [a]dmit mistakes and correct them promptly.").

[119] Niles, *supra* note 76.

[120] *See SPJ – Code of Ethics*, SOCIETY OF PROFESSIONAL JOURNALISTS, http://www.spj.org/pdf/ethicscode.pdf (last visited Jan. 1, 2011).

[121] *Supra* Part II.C.

> *Be sure to report on the expungement of the records of all individuals who were either arrested for, charged with or convicted of a crime and on whom your news organization previously reported regarding said arrest, charge or conviction. Reportage on the expungement of the records should appear in a timely fashion and in as conspicuous a location as the original article(s) reporting on the arrest, charge or conviction, with an explanation to readers describing the legal ramifications of an expunction order within the relevant jurisdiction, such as a restoration of certain rights.*

Implicit support for such an ethical admonition also is drawn from the ethical obligation imposed on journalists to mitigate harm when reporting. As Esther Thorson, a dean of graduate studies and research at the University of Missouri School of Journalism, observed in 2009, the principle of "doing no harm"[122] is one of two core values that "capture[s] the essence of modern journalism's code of ethics."[123] The ethics code of the Society of Professional Journalists, for instance, instructs journalists to "minimize harm."[124] By reporting on expungements of those arrested for or convicted of committing criminal acts, journalists are taking a step toward mitigating the harm to a person who has had his or her name legally cleared through the expungement process.

The SPJ's ethics code also instructs journalists to "[b]alance a criminal suspect's fair trial rights with the public's right to be informed."[125] This too suggests that journalists embrace an ethical obligation to treat fairly those caught up in the criminal justice system, at least at the stage where they are on trial. When reporting on an expunction, not only are newspapers serving "the public's right to be informed,"[126] but they are also treating fairly the individual by letting the public know that he or she should no longer be treated like a criminal. In other words, journalists must be concerned with more than just fair trials; they should be concerned with fairness to the arrestee or convict further down the line.

In conclusion, it now has been a dozen years since the *American Journalism Review* published an astute article entitled, "Without a Rulebook: Cyberspace Presents Journalists with an Entirely New Set of Ethical Dilemmas."[127] This article has attempted to illustrate the emerging dilemma surrounding the topic

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[122] Esther Thorson & Michael R. Fancher, *The Public and Journalists: They Disagree on Core Values*, NIEMAN REP., Fall 2009, at 36.

[123] *Id.*

[124] *SPJ – Code of Ethics*, SOCIETY OF PROFESSIONAL JOURNALISTS, http://www.spj.org/pdf/ethicscode.pdf (last visited Jan. 1, 2011).

[125] *Id.*

[126] *Id.*

[127] Dianne Lynch, *Without a Rulebook: Cyberspace Presents Journalists with an Entirely New Set of Ethical Dilemmas*, 20 AM. JOURNALISM REV. 40 (1998).

of expungement that is posed for both the criminal justice system and journalism in the digital age "where even old and outdated records can be resurrected at will."[128] Journalists can ignore the ethical issues articulated here, of course, by cloaking themselves in comfortable confines of the First Amendment and sticking to the position that they do not have any responsibility for the consequences of their reporting, other than to accurately print the facts about arrests and alleged crimes as they occur. Yet, if the public has a right to know about crime, then surely it has a concomitant right to know when someone has been cleared, via the expungement process, of an offense. That is the ethical issue that journalists now must address, but it also reflects on how they exercise their First Amendment freedoms.

As First Amendment scholar Blake Morant, current dean of the Wake Forest University School of Law, has observed, the "responsible exercise of the right to free expression ensures that coverage of governmental activities is earnest, balanced, and truly informative."[129] In accord with this statement, the criminal justice system is a vital government activity, of course, and reporting on expungement represents both fairness—to the reading public and to the individual whose record is expunged—and informative reporting.

Ultimately, an ethical solution to a legal problem—a legal problem to the extent that laws affecting expungement and the criminal justice system are being undermined by the Internet and online journalism as it currently is practiced—may be unsatisfactory because, as Professor Richard Karcher notes, "journalism ethics codes lack any external enforcement mechanism."[130] What is more, it is neither the job nor the responsibility of an independent news media to help the legal system rectify the problems that now plague expungement laws. Yet, given the First Amendment freedom of the press to choose what to report and what to ignore, it may be the best, albeit imperfect, answer to the predicament at the moment.

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[128] Cameron-Dow, *supra* note 80, at 81.

[129] Blake D. Morant, *The Endemic Reality of Media Ethics and Self-Restraint*, 19 NOTRE DAME J.L. ETHICS & PUB. POL'Y, 595, 596-97 (2005).

[130] Richard T. Karcher, *Tort Law and Journalism Ethics*, 40 LOY. U. CHI. L.J. 781, 782-83 (2009).